

Feb 21, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CITY OF SPOKANE, a municipal corporation, located in the County of Spokane, State of Washington,

Plaintiff,

v.

MONSANTO COMPANY, SOUTIA INC., and PHARMACIA CORPORATION, and DOES 1 through 100,

Defendants.

No. 2:15-CV-0201-SMJ

**ORDER RE DEFENDANTS'
MOTION TO COMPEL**

I. INTRODUCTION

Before the Court, without oral argument, is Defendants Monsanto Company's, Solutia Inc.'s, and Pharmacia LLC's (collectively "Monsanto") Motion to Compel, ECF No. 92. Defendant Pharmacia served Spokane with initial sets of Requests for Production (RFPs), Requests for Admission (RFA), and Special Interrogatories in July 2016. ECF No. 93 at 2. Monsanto argues that Spokane has failed to properly respond to a number of these requests and that the parties have been unable to resolve the dispute. Accordingly, Monsanto requests that the Court order Spokane to (1) produce all documents responsive to Pharmacia's RFPs by

ORDER RE DEFENDANTS'
MOTION TO COMPEL- 1

1 February 28, 2017; (2) deem RFA numbers 1 through 3 admitted; and (3) provide
2 complete responses to interrogatories number 1 and 2 and 13 through 16. ECF No.
3 92 at 2–3. Having reviewed the pleadings and the file in this matter, the Court is
4 fully informed and as detailed below grants in part and denies in part Monsanto’s
5 motion.

6 **II. FACTS**

7 On March 18, 2016, the law firm representing Monsanto, Latham & Watkins
8 LLP, submitted a Washington Public Records Act request (PRR) to Spokane,
9 requesting 22 categories of documents. ECF No. 93 at 2; ECF No. 96 at 2, 13–16.
10 The request included a chart with keywords with which to run searches for
11 responsive documents. ECF No. 96 at 2, 19–17. The City Clerk’s office identified
12 over 2,000,000 documents responsive to the PRR and initially estimated it would
13 take approximately ten years to review the documents and respond to the request.
14 ECF No. 93 at 2, 21; ECF No. 93 at 2.

15 On July 6, 2016, Defendant Pharmacia served Spokane with initial sets of
16 RFPs, RFAs, and Special Interrogatories. ECF No. 93 at 2. The requests included
17 22 RFPs broadly requesting relevant documents, including documents,
18 communications, and ordinances concerning PCBs in the Spokane River and
19 documents concerning any of the defendants. ECF No. 93 at 25–37; ECF No. 96 at
20 28–38. There is significant if not complete overlap between documents responsive

1 to the PRR and RFPs. *See* ECF No. 96 at 13–16, 28–38. RFAs 1 through 3, which
2 are at issue in this motion, ask Spokane to admit: (1) “that YOU have no information
3 that PHARMACIA, SOLUTIA, MONSANTO and/or OLD MONSANTO
4 discharged or released PCBs into the SPOKANE RIVER”; (2) “that YOU have no
5 information that PHARMACIA, SOLUTIA, MONSANTO, and/or OLD
6 MONSANTO instructed YOU or any THIRD PARTY to discharge or release PCBs
7 into the SPOKANE RIVER”; and (3) “that YOU have no information that OLD
8 MONSANTO ever manufactured or produced PCBs in the State of Washington.”
9 ECF No. 96 at 48. Interrogatories 1 and 2 and 13 through 16 are at issue here.
10 Interrogatories 1 and 2 request that Spokane (1) “IDENTIFY the date when YOU
11 first became aware of the environmental risks associated with PCBs as described in
12 YOUR COMPLAINT”; and (2) “IDENTIFY the date when YOU first became
13 aware of the presence of PCBs in the SPOKANE RIVER as described in YOUR
14 COMPLAINT.” ECF No. 93 at 52–54. Interrogatories 13 through 16 ask Spokane
15 to disclose costs it has incurred that may be relevant to its damages. ECF No. 93 at
16 65–69.

17 Spokane served its responses and objections to Pharmacia’s initial discovery
18 requests on August 5 and 19, 2016. ECF No. 93 at 2, 23–37. In response to the
19 RFPs, Spokane made a number of objections, but agreed to provide non-privileged,
20 responsive documents. ECF No. 93 at 23–37. In response to the RFAs at issue here,

1 Spokane indicated that it could neither admit nor deny the statements, but
2 acknowledged that it was unaware of any responsive information. ECF No. 93 at
3 42–45. In response to interrogatories 1 and 2, Spokane responded that it was unable
4 to identify a certain date when it became aware of environmental risks associated
5 with PCBs or the presence of PCBs in the Spokane River. ECF No. 93 at 52–54. In
6 response to interrogatories 13 through 16, Spokane described examples of
7 categories of responsive costs and indicated that it would search for and produce
8 responsive documents, but it did not provide specific details of incurred or expected
9 costs. ECF No. 93 at 66–68.

10 On September 28, 2016, Monsanto’s counsel sent a letter to Spokane’s
11 counsel addressing Spokane’s objections and responses. ECF No. 93 at 3, 75–97.
12 The parties met and conferred telephonically on the subject four times in October
13 and November 2016. ECF No. 93 at 3. In mid-November 2016, the parties
14 exchanged several more letters on the subject of Spokane’s responses to discovery
15 requests (and discovery issues concerning municipalities involved in related
16 litigation). ECF No. 93 at 3, 99–135.

17 Because of the significant overlap between the documents responsive to the
18 PRR and the documents responsive to the RFPs, Spokane’s counsel determined that
19 rather than producing responsive documents twice, she “would ensure that
20 additional documents to be produced in response to the RFPs (if any) would be put

1 in line for production as part of the PRR process.” ECF No. 96 at 3. Spokane has
2 made disclosures responsive to the PRR at 60 day intervals beginning in July 2016,
3 ECF No. 93 at 137–146; ECF No. 96 at 51. As of late January 2017, Spokane had
4 produced over 767,000 pages of responsive documents. ECF No. 96 at 4–5.
5 Spokane has prioritized searches for certain keywords with the intent of producing
6 documents most likely to be relevant first. ECF No. 96 at 4. Spokane has not asked
7 for an extension to respond to any of Monsanto’s discovery requests and represents
8 that it will complete disclosures within the time required by the Court’s scheduling
9 order and in compliance with the Rules of Civil Procedure. ECF No. 96 at 3, 9.

10 **III. LEGAL STANDARD**

11 A party may move to compel disclosure or discovery after certifying “that
12 the movant has in good faith conferred or attempted to confer with the person or
13 party failing to make disclosure or discovery in an effort to obtain it without court
14 action.” Fed. R. Civ. P. 37(a)(1). On a motion to compel disclosure or discovery,
15 the party opposing discovery bears the burden of resisting disclosure. *Rogers v.*
16 *Giurbino*, 288 F.R.D. 469, 479 (S.D. Cal. 2012). “A district court has wide
17 discretion in controlling discovery.” *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir.
18 2011) (quoting *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir.1988)).

IV. DISCUSSION

A. Spokane's responses to RFPs

Monsanto asks the Court to order Spokane to produce all responsive, non-privileged documents to Pharmacia's RFPs. ECF No. 92 at 9. Spokane argues that it has not intentionally delayed production of any documents requested by Monsanto, and that it intends to complete production of the documents within the discovery timeframe set by the Court. ECF No. 95 at 10; ECF No. 96 at 3, 9.

The Court finds that Spokane appears to be working diligently to produce the responsive documents in its possession and that Spokane has already produced a very substantial number of responsive documents. There is no indication of intentional or unwarranted delay or that Spokane is withholding documents—Spokane has made clear that it will ensure that all non-privileged documents responsive to the RFPs will be produced. However, given the complicated factual nature of this case, and the volume of documents at issue, production of the documents responsive to Pharmacia’s RFPs must be completed well in advance of the August 11, 2017 discovery cutoff in order for trial in this matter to proceed as scheduled. Accordingly, the Court orders Spokane to complete production of responsive documents by Friday, May 12, 2017.

1 **1. The Court will not interfere at this time in the parties negotiations**
2 **concerning methods for further expediting production of documents.**

3 Spokane has offered to permit Monsanto to expedite review of certain boxes
4 that are likely to contain relevant documents if Monsanto will agree to withdraw its
5 PRR with respect to those documents so that the parties can enter a clawback
6 agreement. ECF No. 95 at 8–9; ECF No. 96 at 6–7. Monsanto has rejected these
7 offers and argues that Spokane has not explained why it cannot review and produce
8 responsive documents without a clawback agreement. ECF No. 92 at 6. Monsanto
9 further argues that Spokane cannot ask it to withdraw its PRR in order to permit
10 production of responsive documents, ECF No. 92 at 6–7, and correctly points out
11 that parties public records rights are not diminished by engaging in litigation, *see*
12 *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, n. 23
13 (1978). But Spokane is clearly not asking Monsanto to sacrifice its public records
14 rights in order to permit production of these documents; Spokane is merely asking
15 Monsanto to withdraw its PRR with respect to particular documents if it would like
16 to review those documents *more expeditiously*. Nevertheless because Spokane
17 represents that the documents will be reviewed and produced within the required
18 timeframe, ECF No. 96 at 9, there is no need for the Court to interfere with respect
19 to Spokane's proposal for expediting review of these documents.

1 **2. Monsanto has not demonstrated that Spokane is intentionally**
2 **producing non-responsive documents.**

3 Monsanto argues that many of the produced documents are not responsive to
4 the RFPs. ECF No. 92 at 8. While the documents cited by Monsanto appear to be
5 irrelevant to this litigation, *See* ECF No. 93 at 147–155; ECF No. 96 at 59–61, they
6 are responsive to the PRR and RFPs because they are portions of or attachments to
7 communications containing the word “Monsanto.” ECF No. 96 at 8–9.

8 **B. Requests for Admission**

9 Monsanto identifies three requests for admission that it argues Spokane has
10 not properly answered:

11 **REQUEST FOR ADMISSION NO. 1:**

12 Admit that YOU have no information that PHARMACIA, SOLUTIA,
13 MONSANTO and/or OLD MONSANTO discharged or released PCBs
14 into the SPOKANE RIVER.

15 **REQUEST FOR ADMISSION NO. 2:**

16 Admit that YOU have no information that PHARMACIA, SOLUTIA,
17 MONSANTO, and/or OLD MONSANTO instructed YOU or any
18 THIRD PARTY to discharge or release PCBs into the SPOKANE
19 RIVER.

20 **REQUEST FOR ADMISSION NO. 3:**

21 Admit that YOU have no information that OLD MONSANTO ever
22 manufactured or produced PCBs in the State of Washington.

23 ECF No. 92 at 10–11; ECF No. 93 at 42–45. Spokane responded that it could neither
24 admit nor deny the truth of the averment in each of the requests. However, Spokane
25 also acknowledged that it was not aware of any responsive information. ECF No.

1 93 at 42–45. Specifically, in response to RFA number 1, Spokane stated “[a]t this
2 point, Plaintiff is unaware of any facility owned or operated by Monsanto whereby
3 Monsanto may have discharged or released PCBs directly into the Spokane River.”
4 ECF No. 93 at 43. In response to RFA number 2, Spokane stated “[a]t this point,
5 Plaintiff is unaware of any direct instruction by Monsanto to Plaintiff or any third
6 party to discharge or release PCBs directly into the Spokane River.” ECF No. 93 at
7 44. In response to RFA number 3, Spokane stated “[a]t this point, Plaintiff is
8 unaware of any manufacturing or production facility OLD MONSANTO had in the
9 State of Washington.” ECF No. 93 at 45. Monsanto argues that Spokane has failed
10 to comply with Rule 36, and that the Court should deem each of the RFPs admitted.
11 ECF No. 92 at 14–15.

12 If a party neither admits nor denies a matter it must “state in detail why [it]
13 cannot truthfully admit or deny.” Fed. R. Civ. P. 36(a)(4). “The answering party
14 may assert lack of knowledge or information as a reason for failing to admit or deny
15 only if the party states that it has made reasonable inquiry and that the information
16 it knows or can readily obtain is insufficient to enable it to admit or deny.” *Id.* “[A]
17 response which fails to admit or deny a proper request for admission does not
18 comply with the requirements of Rule 36(a) if the answering party has not, in fact,
19 made ‘reasonable inquiry,’ or if information ‘readily obtainable’ is sufficient to
20 enable [it] to admit or deny the matter.” *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d

1 1242, 1247 (9th Cir. 1981). “On finding that an answer does not comply with this
2 rule, the court may order either that the matter is admitted or that an amended
3 answer be served.” Fed. R. Civ. P. 36(a)(6). However, ordering an answer admitted
4 is a “severe sanction” and a “district court should ordinarily first order an amended
5 answer, and deem the matter admitted only if a sufficient answer is not timely filed.”
6 *Asea*, 669 F.2d at 1247.

7 Here, Spokane has complied with its obligations under Rule 36. Spokane
8 states that it cannot admit or deny the assertions, and explains why, but
9 *acknowledges that it has no responsive information*. Monsanto can interpret this as
10 tacit admission of the RFAs if it wishes. But there is no need for the Court to impose
11 the severe sanction of ordering these matters admitted, and there would be little
12 purpose served by directing Spokane to file an amended answer, as Spokane has
13 made quite clear that it has no information that Monsanto discharged or instructed
14 a third party to discharge PCBs into the River or had manufacturing facilities in
15 Washington. ECF No. 93 at 43–45.

16 **C. Special Interrogatories.**

17 Monsanto argues that Spokane’s answers to Interrogatories 1 and 2 and 13
18 through 16 are inadequate, and that Spokane must be compelled to provide adequate
19 responses. ECF No. 92 at 15.

1 “Each interrogatory must, to the extent it is not objected to, be answered
2 separately and fully in writing under oath.” Fed. R. Civ. P. 33(b)(3). An
3 interrogatory answer must be responsive to the question and “should be complete
4 in itself and should not refer to the pleadings, or to depositions or other documents,
5 or to other interrogatories, at least where such references make it impossible to
6 determine whether an adequate answer has been given without an elaborate
7 comparison of answers.” *Aspen Grove Owners Ass’n v. Park Promenade*
8 *Apartments, LLC*, 2010 WL 3788038, *6 (W.D. Wash. Sept. 17, 2010) (quoting
9 *Scaife v. Boenne*, 191 F.R.D. 590, 594 (N.D. Ind. 2000)). “A party has an obligation
10 to conduct a reasonable inquiry into the factual basis of its discovery responses.”
11 *Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point Events, LP*, 256 F.R.D. 678,
12 680 (C.D. Cal. 2009).

13 **1. Special Interrogatories 1 and 2.**

14 Interrogatory No. 1 states: “IDENTIFY the date when YOU first became
15 aware of the environmental risks associated with PCBs as described in YOUR
16 COMPLAINT.” ECF No. 93 at 51. After objecting on the basis of vagueness and
17 that the interrogatory called for a legal conclusion, and asserting that Monsanto
18 withheld information concerning the risks of PCBs from the public and consumers,
19 Spokane gave the following response:

20 [I]t is impossible to identify a time certain by which Plaintiff became
aware of “the environmental risks associated with PCBs” because

there are numerous risks associated with PCBs and the process of learning about the harm caused by PCBs is done on a continuing basis. Simply being aware of the presence of PCBs, for example, does not necessarily equate to being aware of the full implications of the harm caused to human health and the environment. Moreover, the ability to detect PCBs in the environment is continually evolving. To complicate matters, Plaintiff has had more than 2000 employees over time, each having potentially learned about various “risks” associated with PCBs at different times. It would be burdensome to attempt to determine each of these employees’ knowledge. Moreover, one employee learning something at a given time does not equate to the Plaintiff having institutional knowledge of this information. Subject to and without waiving the foregoing objections, information on what may have been learned by which of Plaintiff’s employees over time may be within the documents Plaintiff has agreed to produce.

ECF No. 93 at 23.

Interrogatory number 2 states: “IDENTIFY the date when YOU first became aware of the presence of PCBs in the SPOKANE RIVER as described in YOUR COMPLAINT.” ECF No. 93 at 53. Spokane objected for the same reasons it objected to interrogatory number 1, and then offered the following response:

[I]t is impossible to identify a time certain by which “Plaintiff” became aware of “the presence of PCBs in the SPOKANE RIVER.” Plaintiff has had more than 2000 employees over time, each having potentially learned about PCBs’ presence “in the SPOKANE RIVER” at different times. It would be burdensome to attempt to determine each of these employees’ knowledge.

Moreover, the ability to detect PCBs in the environment is continually evolving. Finally, one employee learning something at a given time does not equate to the Plaintiff having institutional knowledge of this information. Subject to and without waiving the foregoing objections, information on what may have been learned by which of Plaintiff's

1 employees over time may be within the documents Plaintiff has agreed
2 to produce.

3 ECF No. 93 at 53–54.

4 Monsanto argues that these responses are inadequate. ECF No. 92 at
5 18–20. Monsanto argues that the interrogatories are not vague, and that the
6 interrogatories do not ask Spokane to identify when any of its *employees* first
7 became aware of the risks and presence of PCBs in the Spokane River, only
8 when *Spokane* became aware of the risks and presence of PCBs in the
9 Spokane River. ECF No. 92 at 18–19.

10 Spokane’s answer to interrogatory number 1 is sufficient. The phrase
11 “environmental risks” is broad and ambiguous, and Spokane adequately
12 explains that it cannot identify a date certain that it was aware of such
13 generalized and undefined risks “because there are numerous risks associated
14 with PCBs and the process of learning about the harm caused by PCBs is
15 done on a continuing basis.” ECF No. 93 at 53.

16 Spokane has not demonstrated, however, that it has made a good faith
17 effort to answer interrogatory number 2. Spokane cannot avoid its duty to
18 investigate and completely respond to interrogatories simply because it is an
19 entity with many employees. It is obligated to engage in a reasonable
20 investigation of the records within its control and to attempt to determine
when it, as an entity, learned of the presence of PCBs in the Spokane River.

1 *See Nat'l Acad. of Recording Arts & Scis., Inc.*, 256 F.R.D. at 680. An
2 investigation need not necessarily lead to a definitive answer concerning
3 when Spokane became aware of PCBs in the River, but Spokane must make
4 a good-faith effort to investigate and provide a responsive answer.
5 Accordingly, Spokane shall file an amended answer to interrogatory number
6 2 on or before March 21, 2017.

7 **2. Interrogatories 13 through 16**

8 Interrogatories 13 through 16 ask Spokane to disclose costs it has
9 incurred that may be relevant to its damages. ECF No. 93 at 65–69. Spokane
10 described examples of categories of responsive costs and indicated that it
11 would search for and produce responsive documents, but it did not provide
12 specific details of incurred or expected costs. ECF No. 93 at 66–68.

13 Monsanto argues that Spokane failed to properly answer these
14 interrogatories, greatly impairing Monsanto's ability to have its experts
15 review damages and otherwise prepare for trial. ECF No. 92 at 25.
16 Specifically, Monsanto argues that Spokane's responses fail to identify any
17 actual costs Spokane has incurred, noting that Spokane has not identified
18 "one single dollar in costs." ECF No. 92 at 27–29; ECF No. 9.

19 Spokane argues that its response did exactly what was asked—
20 "identifying and describing in detail all the costs expended by the City

1 addressing PCBs.” ECF No. 95 at 16. However, Spokane does not dispute
2 that Monsanto is entitled to additional information. ECF No. 95 at 17.
3 Instead, Spokane argues that calculation of claimed damages will require
4 Spokane to conduct extensive analysis, including consultation with experts
5 and interviews with numerous current and former City employees, and that it
6 intends to timely supplement its response with estimated damage
7 calculations. ECF No. 95 at 17–18; ECF No. 96 at 9–10.

8 Spokane must provide complete responses to these interrogatories,
9 including numerical summaries or calculations of relevant costs incurred or
10 expected to be incurred, as appropriate. In doing so Spokane may not
11 reference produced documents without expressly citing the nature and
12 location of responsive information in those documents. Spokane shall file
13 complete amended responses to interrogatories 13 through 16 on or before
14 Friday, May 12, 2017.

CONCLUSION

For the reasons discussed, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Compel, ECF No. 92, is GRANTED IN

PART AND DENIED IN PART.

2. Plaintiff shall complete production of documents responsive to Defendant Pharmacia's Requests for Production on or before **Friday, May 12, 2017.**
3. Plaintiff shall file an amended answer to Defendant Pharmacia's Special Interrogatory No. 2 on or before **March 21, 2017.**
4. Plaintiff shall file complete amended responses to Defendant Pharmacia's Special Interrogatories 13 through 16 on or before **Friday, May 12, 2017.**

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 21st day of February 2017.

Salvador Mendoza Jr.
SALVADOR MENDEZA, JR.
United States District Judge